No. 17-1091

In the
Supreme Court of the United States

TYSON TIMBS, et al.,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari
to the Indiana Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner Tyson Timbs.[1]

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 45 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous United States Supreme Court cases in defense of property owners. *See, e.g.*, *Knick v. Township of Scott*, No. 17-647, 138 S. Ct. 1262 (2018) (granting cert.); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also often represents property owners facing large fines for using their own property. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 127 (2012) (property owners facing $75,000 per day fines); *Nemhauser v. City of Mount Dora*, No. 5:18-cv-00087, slip op. at 2 (M.D. Fla. Feb. 21, 2018) (property owners facing $100 per day fines, exceeding $10,000, for Van Gogh-style

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

mural). Because of its experience representing property owners facing potentially ruinous fines and penalties, PLF believes that its perspective will aid this Court in considering whether the Excessive Fines Clause protects Mr. Timbs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae PLF files this brief to draw this Court's attention to state and local governments' abuse of their power to fine and forfeit property. Local governments today often regulate innocuous activities like residential landscaping choices or minor home improvements, and punish people for failing to comply. Some fines vastly outweigh any potential public harm caused by the violation. It is common for such fines to accrue by the day, causing property owners who cannot afford to fix a violation, or who fail to receive notice, to lose the entire value of their property. Weighty fines can lead property owners to abandon constitutional rights or property interests to "play it safe" and avoid potential financial ruin by "fighting city hall."

In the absence of meaningful protection from this Court, state and local governments across the country have imposed immense fines for small violations of the law. As the examples in this brief will demonstrate, no offense is too small and no fine too big according to many state and local agencies, so long as the applicable statute, ordinance, or regulation authorizes the fine.

When proceeds from fines subsidize the enforcing agency's budget, local officials have an incentive to pick the harshest penalty available under

law, regardless of whether that penalty is proportionate to the offense. This incentive is particularly visible in communities that have struggled to balance their budgets, like Wayne County, Michigan, discussed below. Consequently, excessive fines subsidize government operations, augmenting tax revenue by shifting to hapless individuals a disproportionate share of the tax burden that should be borne by the public as a whole.

Amicus curiae PLF asks this Court to hold that the Eighth Amendment is incorporated against the states by the Fourteenth Amendment and to affirm that a fine does not satisfy the Constitution merely because it is within a legislatively set limit. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Deference to the policy decisions of legislative bodies does not mean courts should abandon their duty to protect human dignity. "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.*

ARGUMENT

I

IN THE ABSENCE OF MEANINGFUL JUDICIAL SCRUTINY, STATE AND LOCAL GOVERNMENTS ABUSE THEIR POWER TO IMPOSE FINES FOR MINOR VIOLATIONS OF LAW

Previous generations would be baffled by a survey of state and local rules in modern America. Local laws that subject property owners to fines include a wide array of harmless activities—like

having too many cars in the driveway,[2] parking on the lawn next to the driveway,[3] peeling paint,[4] cracks in a residential driveway,[5] having long grass, or not planting enough grass.[6] Although these violations at times may even be processed as criminal, the only harm in many cases is to a fussy neighbor's aesthetic ideals. Courts have largely allowed such pervasive rules, and deferred to whatever punishment local agencies demand. As a result, volumes could be written about the outrageous fines property owners face for minor offenses. Without meaningful protection from this Court, there is little brake on the

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[2] *See, e.g.*, Common Violations Found in Residential Neighborhoods, Cobb County Government, https://cobbcounty.org/index.php?option=com_content&view=article&id=6891:common-violations-found-in-residential-neighborhoods&catid=571&Itemid=2111 (single family homes only allowed to park one car per 390-square-feet of living space); Jim Strikland, *County threatens to fine family for having 'too many cars in driveway'*, Atlanta Journal-Constitution, July 20, 2015, https://www.ajc.com/news/local/county-threatens-fine-family-for-having-too-many-cars-driveway/WGtEsEqtsuekDA4c46XMuL/.

[3] *See, e.g.*, Karl Torp, *OKC Cracking Down On Residents Parking Cars On Grass*, Oklahoma City News 9, Feb. 2, 2017, http://www.news9.com/story/34414837/okc-cracking-down-on-residents-parking-cars-on-grass.

[4] *See, e.g.*, Jason Volentine, *Phoenix neighborhood fed up with person reporting homes for nit-picky repairs*, ABC15 Arizona, Jan. 25, 2018, https://www.abc15.com/news/state/phoenix-neighborhood-fed-up-with-person-reporting-homes-for-nit-picky-repairs.

[5] Scott Berson, *People in this city are sick of "ludicrous" fines from officials. Now they're suing*, Ledger-Enquirer, June 1, 2018, https://www.ledger-enquirer.com/news/state/georgia/article212322284.html.

[6] *Duffner v. City of St. Peters*, No. 4:16-CV-01971-JAR, 2018 WL 1519378, at *1 (E.D. Mo. Mar. 28, 2018).

outlandish fines local and state governments dream up.

A. Daily Fines in Florida

Municipalities and state agencies—like states themselves—commonly enjoy broad powers to impose fines. For example, in the state of Florida, state law allows local county and municipal code enforcement boards to impose fines of up to $500 per day for each violation of local code. *See* Fla. Stat. § 162.09. The statute makes no differentiation between trivial violations and severe ones that may threaten public health. *See id.*

Because state and federal courts have refused to recognize any meaningful constitutional limits on this statutory power to fine, property owners have been forced to pay unconscionable fines for small violations. For example, in 2011, one homeowner in Islamorada, Florida, was stunned to discover a $115,625 lien on his property when he sold his home. *Finger v. Islamorada, Vill. of Islands*, No. 16-AP-1-P, slip op. at 2 (16th Jud. Cir. May 2, 2017). The offense? The homeowner failed to register a newly installed burglar alarm with the local government. *Id.*

The town sent the homeowner a notice of the violation and the possibility of daily accruing fines of $75 per day. *Id.* But the owner did not understand the peril he faced and failed to get the pro forma permit. *See id.* at 2-3. Thus the fine accrued for months until the owner sold the property. When the homeowner begged for mercy, the town ultimately cut the $115,625 fine to $57,812. *Id.* at 2.

The sad irony of a burglar alarm installation causing a property owner to be robbed in broad

daylight by the government was lost on the board and on the local courts. When the owner protested that the fine violated the Excessive Fines Clause, the Florida circuit court held that it was inappropriate to question the policy decision of a legislative body. *Id.* at 4-5.

Indeed, this refusal to recognize that daily fines can be unconstitutionally excessive is a recurring problem in Florida. The Eleventh Circuit rejected a similar Eighth Amendment claim raised by octogenarian Jeannette Moustakis. *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 820 (11th Cir. 2009). Mrs. Moustakis had spent thousands of dollars hiring workers and architects to draw plans to remedy previously unpermitted improvements by bringing them into compliance with local codes. Brittany Wallman, *Code battle builds into $831,000 fine*, South Florida Sun-Sentinel, Aug. 14, 2009, http://www.sun-sentinel.com/local/broward/fort-lauderdale/sfl-moustakis-code-08-story.html. But she did not receive a permit. *Id.*

Fines accumulated at $150 per day and fast outgrew the value of the $200,000 home—totaling more than $700,000 by the time the Eleventh Circuit issued a decision in the case. *Moustakis*, 338 F. App'x at 822.[7] Nonetheless, the Eleventh Circuit rejected her claim, simplistically holding that "$700,000 is within the range of fines prescribed by the Florida Legislature and accordingly is due our substantial deference." *Id.* Because the fines accrued by the day, the court also held "the $700,000 fine is, literally, directly proportionate to the offense." *Id.*

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[7] Mrs. Moustakis died during litigation, and her son Albert took over the lawsuit.

B. Fines for Violating an Unusable Easement in California

Floridians are not alone in facing ruinous fines for small violations of law. In Malibu, California, Henny and Warren Lent face fines exceeding $4 million for a victimless regulatory offense. *Lent v. California Coastal Commission*, No. BS 167531 (Cal. Super. Ct. May 24, 2018). In 2002, they purchased their Malibu beachfront home, which they primarily use as a vacation rental. *Id.* at 2. In 1980, in exchange for a permit, previous owners dedicated a public access easement next to their home to the California Coastal Commission for it to build a stairway to allow the public to get from street level down to the beach below. *Id.* The government never planned or built a stairway to take advantage of that easement, so in 1983 the previous owners built themselves stairs from the street to the second story of the house and installed a locking gate to the stairwell to protect the home's privacy. *See id.* at 6. The unpermitted stairwell stayed in place for decades. *See id.* at 6-7.

The Coastal Commission demanded that the Lents remove the encroaching stairwell in 2014, and threatened them with $11,250 per day fines. *Id.* at 9-10. The Lents offered to remove the encroaching structure if and when the state actually constructed public stairs from the street to the beach. Such a public stairwell may not even be feasible and, indeed, the government agency never conducted a feasibility study. Finally, the Lents offered to pay a $100,000 penalty. Jeremy Talcott, Pacific Legal Foundation Blog, *CCC levies a $4.2m fine for blocking nonexistent staircase*, Dec. 9, 2016, https://pacificlegal.org/ccc-levies-4m-fine-blocking-nonexistent-staircase/.

Instead, the Coastal Commission issued a fine of $4,185,000—roughly the full value of the property itself at the time the fine was imposed. *Id.*

This enormous fine for the violation of an unusable public access easement is not justified. The Lent family has not impeded development of the easement; rather the government's own failure to plan or build a stairwell has made it impossible for the public to use it. *See id.*; *Lent*, No. BS 167531, at 2. The Lents appealed the fine to California state court, but that court held that because the fine was within the amount allowed by the California legislature, it was not excessive. *Id.* at 23. Guidance on the application of the Excessive Fines Clause from this Court is the only hope people like the Lents have of reducing fines to a reasonable size.

C. Fines for Residential Landscaping Choices

Many local governments across the nation have turned themselves into local landscaping authorities. Homeowners who think that the constitutionally protected right to use and enjoy their property[8] entails the right to freely landscape have faced stiff fines from local governments.

In Missouri, Carl and Janice Duffner face possible fines of $180,000 because they do not have turf grass in their residential yard. *See Duffner*, 2018 WL 1519378, at *1 (E.D. Mo. Mar. 28, 2018). According to the City of St. Peters regulations, at least half of the Duffners' yard must "be comprised of turf grass." *Id.* But the Duffners planted flowers instead,

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[8] *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544-45 (1972) (recognizing constitutional right to enjoy property).

because Mrs. Duffner is allergic to grass. *Id.* The zoning board eventually granted the Duffners a variance, reducing the required amount of turf grass to only five percent of the yard. *Id.* But this was still too much grass for Mrs. Duffner, so the couple sought relief in court.

The trial court ruled against them, rejecting their Excessive Fines claim because such fines were authorized by state law and the court had "not found, any case law holding that a penalty provision similar to that imposed by the City for violations of the Turf Grass Ordinance is excessive." *Id.* at *7.

Although a minimum grass requirement is rare, many other local governments regulate landscaping in other ways. Many cities have banned vegetable gardens in some manner—imposing harsh fines for people who dare grow produce on their land. *See, e.g.*, *Ricketts v. Vill. of Miami Shores*, 232 So. 3d 1095, 1096 (Fla. Dist. Ct. App. 2017), *review denied*, No. SC17-2131, 2018 WL 794717 (Fla. Feb. 9, 2018) ("Facing the threat of fines of $50 per day, Hermine and Tom destroyed their beloved garden . . . ."); Deborah Geering, *A guy, a garden and an anti-veggie zoning code*, Atlanta Magazine, Sept. 17, 2010, http://www.atlantamagazine.com/dining-news/ a-guy-a-garden-and-an-anti-veggie-zoning-code/ (man paid $5,200 in fines imposed by DeKalb County, plus paid a lawyer to apply to rezone his land so that he could continue his vegetable garden). Other communities cite responsible[9] homeowners when a plant or some

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[9] Fines do not only hurt irresponsible people. Even government agencies run afoul of local code enforcement. For example, in the last year, the Hamilton County Land Bank was fined a total of $115,450 by the City of Cincinnati for tall grass or litter found on

grass dies. *See, e.g.*, Kevin D. Thompson, *Commentary: Is Lake Worth homeowner's dying lawn worth a citation?*, Palm Beach Post, May 13, 2016, https://www.palmbeachpost.com/news/local/commentary-lake-worth-homeowner-dying-lawn-worth-citation/w0ZbQ9uQzvTAaO8wYgWAtI/ (faced fines from the City of Lake Worth when some of her grass died over the winter, leaving an "unsightly" sandy spot).

In another example, Roger and Myrna Byrd were fined $1.6 million for cutting down mangroves on their Jupiter, Florida, property without a permit. *Town of Jupiter v. Byrd Family Tr.*, 134 So. 3d 1098, 1100 (Fla. Dist. Ct. App. 2014). The property was only worth approximately $1.2 million. Bill DiPaolo, *Byrds' final mangrove fine $49,000, but was it still a good investment?*, Palm Beach Post, Apr. 6, 2016, https://www.mypalmbeachpost.com/news/local/byrds-final-mangrove-fine-000-but-was-still-good-investment/guFZajoOJIWCvLopFKoVBN/. The Byrds ultimately succeeded in avoiding the excessive fines not with the Eighth Amendment, but by proving the local regulations were preempted by state law. *See id.* (The Byrds ultimately paid the state environmental agency's $45,000 fines and legal fees.); *Byrd*, 134 So. 3d at 1100-101. But the Eighth Amendment should prevent such fines, even when state and local laws do not come to the rescue.

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its properties. Paula Christian & Craig McKee, *I-Team: Who owes $115,450 in fines for weeds and litter, but won't pay a cent?*, WCPO Cincinnati, Aug. 30, 2018, https://www.wcpo.com/news/insider/i-team-who-owes-115-450-in-fines-for-weeds-and-litter-but-won-t-pay-a-cent-.

II

WITHOUT EXCESSIVE FINES PROTECTION, LOCAL GOVERNMENTS WILL EXPAND FORFEITURE ABUSES TO INCLUDE MORE NON-CRIMINAL ACTIVITY

"[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., plurality opinion). Government agencies stand to benefit when they use their fining or forfeiture power, and consequently courts should closely scrutinize such action.

There is perhaps no more troubling and unjust example of an abuse of the forfeiture power as what Oakland County, Michigan, did to 82-year-old, Uri Rafaeli. Mr. Rafaeli inadvertently underpaid the 2011 property taxes on his $60,000 Southfield, Michigan, home by $8.41. *See Rafaeli, LLC v. Oakland County*, No. 330696, 2017 WL 4803570, at *5 (Mich. Ct. App. Oct. 24, 2017) (Shapiro, J., concurring). Rafaeli paid the 2012, 2013, and early 2014 taxes in full and on time. Nevertheless, in 2014, Oakland County foreclosed on the property to collect the $8.41 tax deficiency dating back to 2011. *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *2 (E.D. Mich. June 4, 2015). The County auctioned the property for $24,500 and refused to refund Rafaeli any of the $24,215 that exceeded the total tax debt, penalties, interest, and costs. *Id.* The County called the taking of the property a forfeiture, even though the property was neither an instrumentality nor product of criminal activity. *See Rafaeli*, 2017 WL 4803570, at *5.

The only offense by Mr. Rafaeli was non-criminal—the failure to pay property taxes in full and on time. Rafaeli filed a takings claim seeking the equity that exceeded the $285 in taxes, penalties, interest, and fees, but the Michigan Court of Appeals disagreed, deeming it a valid forfeiture.[10] *Id.* at *1. Rafaeli's petition seeking leave to appeal to the Michigan Supreme Court is still pending. *See Rafaeli, LLC v. Oakland County*, No. 156849 (pending). An Excessive Fines claim pursuant to the Eighth Amendment is not yet viable as a remedy for cases like Mr. Rafaeli's because Michigan is one of those states—like Indiana, the Defendant in the instant case—that has not recognized the incorporation of the Eighth Amendment.

Rafaeli's story is not unique. Many other property owners in Michigan have lost tens of thousands of dollars in equity—beyond what they owed in taxes, interest, fees, and penalties. *See, e.g.*,

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[10] To be sure, amicus curiae believes the confiscation of Mr. Rafaeli's property is best classified as an uncompensated taking. *See, e.g., Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause); *Bogie v. Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970) (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014) (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *see also Armstrong v. United States*, 364 U.S. 40, 48 (1960) (Takings Clause protection doesn't simply disappear because the property owner owes the government money.). But this case is instructive, because it shows the perverse incentives for state and local governments to abuse forfeiture powers to punish minor offenses.

Wayside Church v. Van Buren County, 847 F.3d 812, 822 (6th Cir. 2017); *Donald Freed v. Michelle Thomas, et al.*, No. 17-CV-13519-BAF-PTM (E.D. Mich.) (County sold a $100,000 home for $42,000 to pay a $2,000 tax bill, and kept all proceeds) (pending). Such schemes most often hurt the elderly, sick, or economically distressed. *See, e.g.*, John Rao, The Other Foreclosure Crisis: Property Tax Lien Sales, National Consumer Law Center (NCLC) at 5 (July 2012), http://www.nclc.org/images/pdf/foreclosure mortgage/tax_issues/tax-lien-sales-report.pdf. While most states refund the surplus proceeds from the sale of tax distressed properties to the former owners,[11] Michigan—like only a few other states—empowers the foreclosing government unit to pocket the proceeds.[12]

Wayne County may be profiting more at the expense of struggling property owners than any other county from this tax foreclosure scheme. "Since 2012, Wayne County's treasurer has pumped an extra $382 million into the county's general fund" from fines and interest for late payments and by confiscating surplus profits from the sale of such foreclosures. *See, e.g.*, Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget.*, Bridge Magazine, June 6, 2017, https://www.bridgemi.com/detroit-journal

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[11] *See, e.g.*, Ala. Code § 40-10-28; Fla. Stat. § 197.582; Ga. Code Ann. § 48-4-5; Me. Rev. Stat. tit. 36, § 949; 72 Pa. Stat. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080.

[12] Massachusetts, Minnesota, Montana, North Dakota, and Oregon have similar confiscatory laws. *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (Mass. 1965); Minn. Stat. Ann. § 280.29; Mont. Code Ann. § 15-17-322; N.D. Cent. Code Ann. § 57-28-20.

ism-cooperative/sorry-we-foreclosed-your-home-thanks-fixing-our-budget.

Unless this Court sets meaningful standards to protect property owners from excessive fines and forfeitures, government will expand what can be considered a forfeiture/fine. Amicus Curiae asks this Court to set meaningful limits on this power.

CONCLUSION

This Court should hold the Excessive Fines Clause applies to the states and clarify that the clause requires courts to protect against the excesses of executive *and* legislative bodies.

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Respectfully submitted,

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